

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN COUNCIL 40, AFSCME, AFL-CIO	:	
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Complainant,	:	
	:	
vs.	:	
	:	Case 50
COUNTY OF RICHLAND	:	No. 35325 MP-1738
(PINE VALLEY MANOR) AND	:	Decision No. 22939-A
PINE VALLEY MANOR	:	
	:	
Respondents.	:	
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Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703-3354, appearing on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondents.

FINDINGS OF FACT CONCLUSIONS  
OF LAW AND ORDER

The above named Complainant having on July 11, 1985, filed a complaint with the Wisconsin Employment Relations Commission, herein the Commission, wherein it is alleged that the above named Respondent County of Richland (Pine Valley Manor) has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on September 30, 1985 having appointed Andrew Roberts, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sect. III.07(5), Stats; a hearing on said complaint was conducted in Richland Center, Wisconsin on November 19, 1985 before the Examiner; at the hearing the Complainant amended its complaint to include Pine Valley Manor as a separate Respondent; 1/ a transcript of the proceedings was provided to the Examiner and to the parties on December 6, 1985; initial briefs were submitted by December 17, 1985, the Complainant filed a reply brief on January 16, 1986 and the record was closed on February 5, 1986, pursuant to the Respondent's notification that it was not filing separate reply briefs; the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter the Complainant, is a labor organization having principal offices located at 5 Odana Court, Madison, Wisconsin; and that at all times material herein Jack Bernfeld was the Staff Representative for the Complainant.

2. That Richland County, hereinafter the Respondent, is a municipal employer having its principal offices at Richland Center, Wisconsin; that Pine Valley Manor is a department of Richland County, and that Attorney Jack Walker was the Chief Negotiator for the Respondent.

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1/ The Complainant had amended the complaint at hearing to allege Pine Valley Manor separately. However, the Respondent indicated in its post-hearing brief that it is not contending that the County is not the employer. In light of this fact, it is apparent that Pine Valley Manor is a department of Richland County. There is therefore no need to identify Pine Valley Manor separately from Richland County. Hence, the Respondent is identified as Richland County (Pine Valley Manor).

3. That in May, 1984 the Commission certified the Complainant as the exclusive bargaining representative for the employees in the bargaining unit; 2/ and that the Complainant and Respondent thereafter began negotiations over their first collective bargaining agreement.

4. That at the end of 1979, 1980, 1981, 1982, and 1983 the Respondent gave employees of the Respondent a free turkey; that at a bargaining session sometime prior to November 27, 1984 Walker indicated that the Respondent would not provide turkeys but would hold a Christmas party; that Bernfeld then asked Walker to inform him as to how many years the Respondent has provided turkeys; that in response to that question Walker sent Bernfeld the following letter, dated November 27, 1984:

. . .

You also asked how many years the Pine Valley Manor Board had voted to give turkeys, so that you could assess whether or not you agree with us that it isn't a term of employment. I had told you that my understanding was that the Board was not planning to vote to give a gift of turkeys this year.

The answer to your question is that the Board has voted to give Christmas gifts in the form of turkeys for five years.

I should also confirm that the home is planning to have an employee holiday party this year. We also don't believe that's a term of employment. You stated, however, that you didn't have any objection to such a holiday party;

that Bernfeld then responded with a December 3, 1984 letter to Walker as follows:

I am in receipt of your letter of November 27, 1984. It is my understanding that Richland County will not provide employees with turkeys as Christmas gifts this year. Your letter indicated that this was a practice for five (5) years. It is our position that such gifts constitute a term and condition of employment and that failure to follow this tradition will violate the law, specifically, Section 111.70, Wisconsin Statutes. We request that the County cease and desist from altering the status quo during negotiations for the parties initial labor agreement.

Should you have any questions, please contact me;

that in a December 12, 1984 bargaining session between the Complainant and Respondent Walker again indicated that the Respondent would not provide turkeys; and that during bargaining the Complainant proposed that the employees receive a turkey.

5. That an investigation for mediation-arbitration was conducted by a member of the Commission's staff; that the parties, as of the date of the hearing, were in the process of exchanging final offers; that in a final offer of the Complainant, dated May 31, 1985, the Complainant proposed:

20.03 The Employer shall continue to provide turkeys to bargaining unit employees each during the month of December on the same basis as this was administered in the past;

and that as of the date of the hearing such remains the Complainant's position.

6. That by the above-described actions of the Respondent said Respondent unilaterally and materially altered wages and terms and conditions of employment of the employees described in Finding of Fact No. 5, and refused to bargain with the Complainant; that the Respondent did not by such actions initiate, create, dominate or interfere with the formation or administration of any labor or employee organization or contribute financial support to it; and that the Respondent did not by such actions encourage or discourage membership in Complainant by

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2/ Richland County (Pine Valley Manor), Dec. No. 21601 (WERC, 5/84).

discrimination in regard to hiring, tenure, or other terms or conditions of employment.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the Respondent, by its above-noted failure at the end of 1984 to grant turkeys to employees represented by the Complainant:

a. committed a unilateral change in the status quo by refusing to give turkeys in accordance with the prior practice, in violation of Sec. 111.70(3)(a)4, Stats.;

b. derivatively interfered with employees' exercise of their Sec. 111.70(2), Stats., right to bargain collectively through a representative, in violation of Sec. 111.70(3)(a)1, Stats.; but

c. did not commit a prohibited practice within the meaning of Secs. 111.70(3)(a) 2 or 3, Stats.

ORDER 3/

IT IS ORDERED that the Respondent, its officers and agents, shall immediately:

1. Cease and desist from implementing unlawful unilateral changes of not giving turkeys to employees represented by the Complainant.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

a. To the extent that the Respondent has not already done so, make all employees (and former employees) in the bargaining unit represented by the Union whole by granting to employees represented by the Union turkeys equivalent in value to those granted during the five years preceding 1984 and by continuing to grant turkeys at the end of succeeding years until the date of implementation of a collective bargaining agreement between the parties.

b. Notify its employees in the bargaining unit represented by the Complainant, by posting in conspicuous places on its premises where notices to such employees are usually posted, a copy of the Notice attached hereto and marked "Appendix A." That notice shall be signed by an authorized representative of the Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.

Dated at Madison, Wisconsin this 16th day of April, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts  
Andrew Roberts, Examiner

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3/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.  
(Footnote 3 continued on Page 4).

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

"APPENDIX A"

NOTICE TO EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

1. WE WILL NOT commit unlawful unilateral changes in wages, hours and working conditions of bargaining unit employees represented by Wisconsin Council 40, AFSCME, AFL-CIO.

2. WE WILL, to the extent that we have not already done so, make whole present and former bargaining unit employees represented by Wisconsin Council 40 with turkeys during the period from the end of 1984 to the date of implementation of our first collective bargaining agreement with Wisconsin Council 40, AFSCME, AFL-CIO.

Dated at \_\_\_\_\_, Wisconsin, this \_\_\_\_ day of \_\_\_\_\_, 1986.

Richland County (Pine Valley Manor)

By \_\_\_\_\_

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

RICHLAND COUNTY (PINE VALLEY MANOR)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The complaint, as amended at hearing, alleges that the Respondent violated Secs. 111.70(3)(a) 1, 2, 3, and 4, Stats., by unilaterally refusing to continue to give turkeys at the end of the year. Respondent denies any violation of MERA.

COMPLAINANT'S POSITION

The Complainant argues that the Respondent has a five year practice of providing turkeys, which was clearly a benefit that resulted from the employment relationship. As such, the Respondent's unilateral discontinuance of the practice upset the status quo and violated MERA. The Complainant notes that even assuming arguendo the subject of providing free turkeys is permissive, there was no timely objection by the Respondent and the matter must be treated as a mandatory subject. The Complainant further argues that, contrary to the Respondent's apparent assertion, the turkeys had value, and their discontinuance was contrary to the employees' reasonable expectation. Even if the Respondent had a number of reasons for discontinuance of the turkeys, if only one such reason was to interfere with the Union then the Respondent's action violated the law. In addition, the Complainant argues that the case cited by the Respondent, Benchmark Industries, Inc., 270 NLRB 22 (1984), affirmed sub nom, Amalgamated Clothing Workers Union, 119 LRRM 3160 (5th Cir. 1985), is not persuasive given that the NLRB in that case was a Reagan dominated Board which overruled a longstanding doctrine that had supported the Complainant's position here. Finally, while the Respondent maintains that its policy manual demonstrated the turkeys were not wages, hours or conditions of employment because they are not mentioned in it, such evidence is neither relevant nor material. Accordingly, such actions of the Respondent interfered with Union activities and upset the status quo so as to violate Secs. 111.70(3)(a) 1, 2, 3, and 4, Stats.

RESPONDENT'S POSITION

The Respondent maintains that Secs. 111.70(3)(a) 1, 2, 3 and 4, Stats., were not violated when it did not give a turkey to employees in 1984. The Respondent argues that the turkeys were Christmas gifts to both bargaining and non-bargaining unit employees and they were not a condition of employment. The Respondent points to the recent Benchmark Industries, Inc., supra, decision of the NLRB which held that Christmas dinners and hams were gifts and thus not terms or conditions of employment. Benchmark effectively overruled contrary decisions of the Board. The Respondent notes that if the turkeys had been given as a term of employment then they should have been, but were not, considered for tax purposes. Each year the Respondent needed to vote to give the turkeys. In 1984 the Respondent did not vote on the matter one way or another. The Complainant is now proposing a new benefit, which changes the past practice because the proposal is independent of whether non-union employees received them and of whether the Respondent votes to give them or not. Even assuming the turkeys were a term of employment, the Respondent did not bargain in bad faith over same; furthermore, City of Brookfield, Dec. No. 19822-C (WERC, 11/84), allows for implementation where necessary, and it was necessary for the Respondent to not give the turkeys in December, 1984 because it would have been impossible to retrieve them from the employees if the Respondent should prevail in arbitration. Moreover, Brookfield is particularly persuasive here because interest arbitration is not appropriate for determining whether to give Christmas presents. In addition, there is a constitutional problem of the involvement of government in Christmas.

DISCUSSION

The Respondent maintains the turkeys were token gifts, not a term of employment; therefore, it must first be determined whether the turkeys are a term of employment which is bargainable. The Respondent cites the recent NLRB case of

Benchmark, supra, to support its position; however, decisions of the NLRB are not controlling. The Commission has long held that a mandatory subject is a matter which is primarily related to wages, hours or conditions of employment. 4/ The undersigned finds that turkeys annually given to employees are items of value no different than any other year end bonus to employees. Such is not distinguishable simply because the Respondent here views the turkeys as a gift. At this stage of the bargaining relationship (prior to the reaching of a first contract) it could be argued that all benefits bestowed by an employer were gifts; yet, such would defeat the intent of a municipal employer's bargaining obligation under MERA. 5/

Having determined the turkeys are bargainable benefits, the next question is whether they were part of the status quo. The Commission has recently stated in School District of Wisconsin Rapids, Dec. No. 19084-C, (WERC, 3/85):

"It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment-- either during negotiations of a first agreement or during a hiatus after a previous agreement has expired--is a per se violation of the MERA duty to bargain."

It is undisputed the turkeys were given at the end of each of the five years prior to 1984. Such is a clear, long-standing practice of the Respondent which the Respondent was obligated to continue pending the parties' initial collective bargaining agreement.

The Respondent maintains, however, that in the previous five years it had to affirmatively decide to give the turkeys, while in 1984 it did not decide to give, or not give, a turkey so it cannot now be charged with implementing a change. However, the test for maintaining or altering the status quo is not dependent upon an employer's internal decision-making process. Under the status quo doctrine the employer is obligated to maintain same, whatever its internal mechanism for doing so, and whether or not non-bargaining unit employees received, or did not receive, turkeys.

The Respondent additionally claims that it was required to implement its position that a turkey would not be given in 1984 because if it should prevail in interest arbitration it would be impossible to retrieve a turkey from the employees. However, in the recent Commission case of Menominee Falls School District, Dec. No. 20499-B (WERC, 10/85), the employer was required to maintain the status quo even though its final offer in arbitration with respect to health insurance was "less" than the status quo. The Commission there stated:

"Hence, under the terms of the award, the District would be entitled to recoup monies from each present and former employee to the extent that the cap was exceeded by the monies paid for health insurance by the District during the period September 1, 1982, through the date of the District's receipt of the mediation-arbitration award."

Similarly, if the Respondent should prevail in a mediation-arbitration, it could likewise recoup the value of turkeys from the employees.

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4/ See, e.g., City of Fond du Lac (Fire Department), Dec. No. 22373 (WERC, 2/85).

5/ While the Respondent further argues the value of the turkeys was not included on the appropriate tax forms and it was not considered for overtime purposes, such does not demonstrate the turkeys to be nonmandatory. How other government agencies (taxing agencies and other labor agencies) may view the turkeys is not pertinent.

The Respondent further contends that if the turkeys are found to be a term of employment then there is a constitutional problem because the turkeys were given as gifts at Christmas, a religious holiday. However, there was no demonstration that bestowing turkeys was religiously based. As such, the turkeys must be viewed as any other year end bonus.

Therefore, based upon the foregoing the Respondent has violated Sec. 111.70(3)(a) 4, Stats., and Sec. 111.70(3)(a) 1, Stats., derivatively.

The Complainant further charges that the Respondent violated Sec. 111.70(3)(a) 2, Stats., by its action. However, nothing in the record indicates the domination or interference with the Complainant Union herein, and that portion of the complaint has been dismissed. Finally, the Complainant additionally claims the Respondent violated Sec. 111.70 (3)(a) 3, Stats., but there was no evidence that the Respondent intended such action to be discriminatory; accordingly, no violation of Sec. 111.70(3)(a) 3, Stats., was found. 6/

With respect to remedy, it is appropriate to place the employees in the position they would have been in if the Respondent had appropriately given them turkeys at the end of each year. The Respondent has therefore been ordered to give the employees turkeys for 1984 equivalent in value to those turkeys granted prior to 1984 and to continue to grant employees turkeys at the end of each succeeding year until the date of implementation of a new collective bargaining agreement.

Dated at Madison, Wisconsin, this 16th day of April, 1986.

By Andrew Roberts  
Andrew Roberts, Examiner

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6/ District of Wisconsin Rapids, supra.